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AUG 25 1983

ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

ABRAHAM STRASSNER,

PETITIONER,

v.

SELMA ROTHSTEIN STRASSNER,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE NEW YORK STATE APPELLATE DIVISION

ABRAHAM STRASSNER
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Brooklyn, New York 11234
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QUESTION PRESENTED FOR REVIEW

1. Whether a foreign divorce decree where petitioner's appearance was obtained by fraud violates petitioner's constitutional rights to due process?

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ABRAHAM STRASSNER,

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RESPONDENT.

PETITION FOR WRITE OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SUPREME COURT OF NEW YORK,
APPELLATE DIVISION

The petitioner, Abraham Strassner,
respectively prays that a writ of cer-
tiorari issue to review the judgment
of the Supreme Court of the State of

New York, Appellate Division entered on the 22nd day of February, 1983.

OPINION BELOW

The Appellate Division entered its decision refusing to overturn the judgment in favor of the respondent on February 22, 1983. A copy of the decision is annexed hereto as Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V

No person shall be deprived of property... without due process of law....

STATEMENT OF THE CASE

On February 22, 1983 the Appellate Division refused to overturn a judgment granting partition of real property

held by the petitioner and respondent, as husband and wife. The Court below having granted partition on the basis of a foreign divorce decree which the petitioner claims was obtained by fraud. On June 16, 1983 the New York State Court of Appeals denied a motion for a leave to appeal. A copy of that order is attached as Appendix B.

REASON FOR GRANTING THE WRIT

Petitioner and Respondent were married on April 4, 1949 and had two children of the marriage. In 1963 the parties purchased, as husband and wife, the premises known as 2316 National Drive, Brooklyn, New York. It is this parcel of real property which is the subject matter of the action below for partition. The matter was brought on by the Respondent by Order to Show Cause and the Petitioner submitted an

Affirmation in Opposition. The matter was referred by Duberstein, J. to Special Referee Joseph P. Imperato to hear and determine. On December 11, 1981 a hearing was held before Special Referee Imperato, and on June 10, 1982, Referee Imperato rendered his decision, and an order was entered pursuant to that decision on July 14, 1982. Judge Imperato's decision was unanimously affirmed by the Appellate Division, Second Department on February 22, 1983.

Respondent contends that in August of 1970 she obtained a bilateral Mexican decree of divorce, thereby severing the martial ties between Respondent and Petitioner. Petitioner contends that no knowledgeable consent to appear in the courts of Mexico was ever procured from him which would have the Mexican action bilateral in nature and further, would

have signaled his acquiescence that the divorce matter be litigated in Mexico.

After August of 1970, it is incontrovertible that the Respondent Wife herein resided with the Petitioner Husband and for each and every year through 1977, filed United States income tax returns jointly with the Petitioner, as husband and wife. It is further uncontroverted that in October of 1970, less than two months after Respondent claims she obtained a bilateral Mexican divorce, she, along with Petitioner, renegotiated the mortgage on the present parcel of real estate with the bank then holding the mortgage. Respondent signed the mortgage, bond and note as the wife of the Petitioner herein.

Thereafter and within a year after Respondent's claimed divorce, Respondent and Petitioner purchased property in the

State of Pennsylvania for use as a summer home. Said property was purchased in the name of the parties as husband and wife and Respondent signed the bond and mortgage note under oath in the State of Pennsylvania as the wife of the Petitioner.

Additionally, Respondent continued to maintain her voter registration as married to the Petitioner herein. Respondent obtained and kept for herself medical benefits under Petitioner's health insurance policy and held herself out as Petitioner's wife. Respondent could not have collected such benefits if she were not Petitioner's wife, and was aware of that restriction at the time she applied for said benefits.

Respondent and Petitioner cohabited and, in addition to such cohabitation,

they held a twenty-fifth wedding anniversary party in the year 1974, which party was attended by, in addition to many others, Respondent's brother, mother and father, all of whom Respondent claims in her testimony knew she had been divorced from the Appellant four years earlier. Respondent continued to receive congratulatory and wedding anniversary cards from her mother and brother as late as 1977, although Respondent claims these members of her family were privy to the fact that she had obtained a divorce in August of 1970. The above facts are uncontroverted and were directly admitted by the Respondent in the hearing below.

Petitioner claims that no knowledgeable consent was ever obtained from him acquiescing in the Mexican divorce

and that in fact the parties are still married and that, therefore, no action in partition may be had.

CONCLUSION

For the foregoing reasons, Petitioner Abraham Strassner respectfully requests that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New York, Appellate Division.

Dated: August 24, 1983

Respectfully Submitted,

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Petitioner Pro Se
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APPENDIX

POINT I

BURDEN OF PROOF

The burden of proof as to the validity of the instrument in evidence purporting to be a consent to appearance in Mexico by the Petitioner in the instant matrimonial is on the Respondent herein. As the court said in Kantrowitz v. Kantrowitz, 21 A.D.2d 654, 249 N.Y.S. 2d 723, in referring to a consent to appear in a Mexican court executed by a party challenging that consent:

This instrument was to be used to [his] advantage for the purpose of severing the marital ties, so the burden was upon him to show that the petitioner executed the same freely and deliberately with a full understanding of [her] rights.

In the instant case at bar, the Respondent was instrumental in procuring the Petitioner's signature on a document which by his own testimony he did not

read. This occurred as a result of a conversation settling a New York divorce action between the parties in which it was agreed to discontinue the New York matrimonial action and Petitioner contends to return his wife to him, as his wife. Respondent contends that the settlement contained a provision by which she would be divorced in Mexico but would continue to live with the Petitioner as husband and wife, holding herself out to all the world as Petitioner's wife while in fact she was divorced. The burden of proof in such unusual circumstances in connection with the procuring of any alleged knowing consent by Petitioner to a Mexican decree must be borne by the party alleging such agreement.

Petitioner contends that he settled the matrimonial case in New York and

that in consequence of said settlement and discontinuance his wife agreed to return to him as his wife. Every fact occurring thereafter was intended to reinforce that conclusion.

POINT II

EXTRINSIC FRAUD HAS BEEN
DEFINED AS INCLUDING FRAUD
COLLATERAL TO THE QUESTION
EXAMINED AND DETERMINED IN
THE ACTION.

The Court in Tamini v. Tamini, 38
A.D.2d 197, 328 N.Y.S.2d 477, defined
the term extrinsic fraud as stated above
and went on to say:

fraud practiced in obtaining
the judgment which may have
prevented the defendant from
having an adversary trial of
the issue or preventing the
defendant from presenting
fully and fairly his side of
the cause ... Included in
such definition are false
representations ... false
promises of compromise.

It is not merely that the Petitioner herein has been denied an

opportunity for a defense, it is that the Petitioner knew of no defense to the Mexican action since the existence of such a defense was fraudulently concealed from him by Respondent's actions prior to and after the alleged Mexican divorce. See Feinberg v. Feinberg, 96 Misc.2d 443, 409 N.Y.S.2d 365. For language directly on point, see Prime v. Hinton, 244 App. Div. 181, 279 N.Y.S. 37 in which the Court stated:

... The appellant erroneously assumes that the defense herein is based solely upon the deprivation of the opportunity to interpose a known defense in the Nevada action. The fact of the matter is, the defendant knew of no defense to the Nevada action. The existence of such defense was fraudulently concealed from the defendant.

See also in this regard, Gardner v. Van Alstyne, 22 App. Div. 579.

POINT III

THE DOCUMENTS SIGNED BY THE
RESPONDENT HEREIN AS THE WIFE
OF THE PETITIONER AFTER THE
ALLEGED DIVORCE ARE
SUFFICIENTLY SIGNIFICANT TO
ESTABLISH FRAUD

In the case at bar, the Respondent admits that she signed documents under oath as the wife of the Petitioner including bonds, notes and mortgages in two states. That she signed and filed income tax returns as the Petitioner's wife for seven (7) years. That she used Petitioner's health insurance policy signing as Petitioner's wife. That she never changed her voter's registration certificate to indicate her single status. In a case analogous to this one, the Court found that the issue centered on credibility and said as follows:

She asserted that she never considered their marriage

dissolved, nevertheless, the election registry rolls of the Board of Elections indicate her civil status when she registered to vote in 1952 as single, in 1955 as divorced, and in 1956 as single, and her withholding tax statements of 1952 and 1955 described her as single.

In the Matter of the Claim of
Sadie Lefkowitz, etc. v. Herman
Silverstein, et al., 11 A.D.2d
841, 203 N.Y.S.2d 118.

In the instant case, the factors are exactly reversed. Here Respondent never changed her voter registration to show that she was single, continued to file joint tax returns as the wife of the Petitioner, sign documents under oath in two states as the wife of the Petitioner, and continued to use Petitioner's health insurance policy and secure benefits for herself as his wife. The issue of credibility is settled. Any admission by the Respondent that she believed herself to be

divorced in light of these documents of moment and of record is supercilious and patently absurd.

Further, her contention that her family knew her to be divorced is beyond credibility when in fact her family participated in 1974 in her Twenty-Fifth wedding anniversary celebration and continued to send her anniversary congratulations through 1977. It is interesting to note that no member of her family was called in rebuttal although her brother was present in court.

POINT IV

AN APPEARANCE IN A FOREIGN COURT TO BE EFFECTIVE MUST BE KNOWINGLY CONSENTED TO

In the instant case, Petitioner, after a long conversation arranged through mutual friends which resulted in a settlement of the New York divorce action between the parties, believed that his wife was returning to him. Much is made by the Respondent's counsel of the signed document purporting to contain his agreement to be represented in the Mexican courts. Petitioner has testified that he signed a document at the home of one Kenneth Shapiro whom the court records indicate was not his attorney but was merely associated with the Petitioner's attorney's firm. All of this pales to insignificance when confronted with the

fact that Petitioner believed he was signing a document which would bring his wife back to him as his wife and never consented to her divorcing him in any court. Had the Petitioner agreed to the farce urged on the court by the Respondent, to wit: a divorce followed by the parties living together and holding themselves out as married to all the world, they could have accomplished that in New York by withdrawing Petitioner's answer and allowing Respondent to obtain an uncontested New York divorce without the necessity of going to Mexico. Respondent knew that Petitioner would not agree to such a travesty and so Respondent connived to go to Mexico where only she would be present and know what occurred and where the Petitioner would never know of the divorce. See in this regard, Kantrowitz

v. Kantrowitz, supra, Greenfield v. Greenfield, 123 N.Y.S.2d 19. With both sides represented by counsel, had they intended what Respondent claims, would they not have worked out an agreement setting forth the respective property rights as well as visitation for the then unemancipated children of this marriage? Of course they would have. Respondent knowing of her deceitful conduct, left these matters for a future date, hoping that by the lapse of time the evidence of her fraud would remain somnambulant. Respondent testified that her life with Petitioner was hellish, that she was physically assaulted by him and yet, after instituting a matrimonial action in New York which was discontinued and obtaining a Mexican divorce, she returns to live with the Petitioner as man and wife in

every way for seven (7) years. To believe that this decree of divorce was obtained in a non-fraudulent manner is pusilanimous and contrary to the facts in evidence.

APPENDIX A

VITO J. TITONE, J.P.
GUY J. MANGANO
DAVID T. GIBBONS
MOSSES M. WEINSTEIN, JJ.

A - January 31, 1983

Selma Rothstein Strassner,
respondent, v Abraham
Strassner, appellant.

Zerin & Cooper, New York, N.Y. (Jay
M. Zerin and Neil Rothfeld of counsel),
for appellant.

Burton G. Rudnick, Brooklyn, N.Y.,
for respondent.

Order of the Supreme Court, Kings County
(IMPERATO, R.), entered July 14, 1982,
affirmed, with \$50 costs and disburse-
ments. No opinion.

TITONE, J.P., MANGANO, GIBBONS AND WEINSTEIN,
JJ., CONCUR.

February 22, 1983 STRASSNER V STRASSNER

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 22, 1983.

HON. VITO J. TITONE, Justice Presiding,
HON. GUY J. MANGANO,)
HON. DAVID T. GIBBONS,) Associate
HON. MOSES M. WEINSTEIN.) Justices

Selma Rothstein Strassner,)	
)	
Respondent,)	Order on
)	Appeal
v.)	from Order
Abraham Strassner,)	
)	
Appellant.)	

In the above entitled cause, the above named Abraham Strassner, defendant, having appealed to this court from an order of the Supreme Court, Kings County, entered July 14, 1982;

and the said appeal having been argued by Jay M. Zerín, Esq., of counsel for the appellant, and argued by Burton G. Rudnick, Esq., of counsel for the respondent, and due deliberation having been had thereon;

and upon this court's decision slip
heretofore filed and made a part hereof,
it is:

ORDERED that the order appealed from
is hereby unanimously affirmed, with \$50
costs and disbursements.

Enter:

/s/ Irving N. Selkin

Clerk of the Appellate Division

APPENDIX B

2 Mo. No. 574
Selma Rothstein Strassner,
Respondent,
vs.
Abraham Strassner,
Appellant.

Motion for leave to appeal denied.

DECISION COURT OF APPEALS JUN 16, 1983.

APPENDIX C

MEMORANDUM

SUPREME COURT KINGS COUNTY

(SPECIAL TERM PART V-A)

By

JOSEPH P. IMPERATO, Special Referee

Dated June 10, 1982

SELMA ROTHSTEIN STRASSNER

vs.

Index #9662/70

ABRAHAM STRASSNER

This application seeking a partition and sale of certain real property was referred to me to hear and determine by Judge Duberstein.

The hearing was held on December 11, 1981 and the following are my findings of fact and conclusions of law.

The facts elicited at the hearing evidence that the parties were married in 1949. In 1963 they bought a parcel of real property as tenants by the entirety. On August 4, 1970 the defendant-husband signed a power-of-attorney and thereafter

plaintiff-wife obtained a Mexican divorce. Subsequent to the parties obtaining the divorce they, by mutual agreement, commenced living together anew in the home now sought to be partitioned. The testimony indicates that the parties held themselves out to be husband and wife, the Mexican divorce notwithstanding.

The defendant-husband, while conceding his signature on the power-of-attorney (see hearing minutes, p. 57), nevertheless contends that he did not know that he signed a Power-of-Attorney and that the divorce was therefore fraudulently obtained. The court finds defendant's testimony incredible, especially in light of his education and investigative background.

This court, in consequence of a valid Mexican divorce, such as here, is required to give full faith and credit to same. Upon the dissolution of the marriage, the

tenancy by the entirety became a tenancy in common. No impediment appearing therefor, the application seeking a partition and sale of the marital abode is granted to the extent of appointing an appraiser to evaluate the property for purposes of sale. Once the evaluation has been made, an application may be made to the court with respect to the disposition of said property. The court shall appoint an independent appraiser and payment of his services shall be borne equally by both parties.

Settle order.

JOSEPH P. IMPERATO
Special Referee